United States Court of Appeals
for the Second Circuit

BRIEF FOR APPELLANT

77-7133

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

In the Matter of

TARGET ROCK CORPORATION

Petitioner-Appellant

v.

LOCAL 431, INTERNATIONAL UNION OF
ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO

Respondent-Appellee

On Appeal from a Decision of the
United States District Court for the Eastern District of New York

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APPELLANT'S BRIEF

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TABLE OF CONTENTS

	Page
Table of Cases and Statutes	1
Statement of Issues	2
Statement of Case	2
Statement of Facts	3
Preliminary Statement	8
Argument There Is No Agreement To Arbitrate Disputes Concerning Insurance Benefits	9
Conclusion	20

TABLE OF CASES AND STATUTES

Page

H.J. Heinz v. NLRB, 311 US 514,
7 LRRM 291 (1941)

IAMAW v. General Electric, 406 F.2d 1046,
70 LRRM 2477 (2d Cir. 1962)

Independent Union v. Procter & Gamble,
312 F.2d 181, 51 LRRM 2752 (2d Cir. 1962),
cert. denied, 374 US 83, 53 LRRM 2544 (1963)

Lodge 2036, IAM v. Hudson Mfg. Co., 331 F.Supp.
361, 78 LRRM 2341 (D. Minn. 1971)

NLRB v. H.K. Porter Co., 397 US 99, 73 LRRM
2561 (1970)

United Steelworkers v. American Mfg. Co.,
363 US 564, 46 LRRM 2414 (1960)

United Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593, 46 LRRM 2423 (1960)

United Steelworkers v. General Steel Industries,
499 F.2d 215, 86 LRRM 2848 (8th Cir. 1974)

United Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574, 46 LRRM 2416 (1960)

Westvaco Corp. v. Paperworkers, ___F.Supp.___,
94 LRRM 2332 (SDNY 1977)

Statutes

New York CPLR §7503

National Labor Relations Act, as amended,
29 USC §150 *et seq*.
    Section 301, Labor Management Relations
    Act, 29 USC §185

STATEMENT OF ISSUES

Are disputes over the substantive terms of a health insurance plan arbitrable under the grievance and arbitration provisions of a separate collective bargaining agreement when that collective bargaining agreement makes no reference whatsoever to the separate and distinct health insurance agreement or to the subject matter of such separate and distinct health insurance agreement?

Can a party to a collective bargaining agreement be compelled to arbitrate, under an arbitration clause limited to the terms of the collective bargaining agreement, the substantive terms of a wholly separate and distinct agreement when the parties disagree as to the terms of such separate and distinct agreement?

STATEMENT OF CASE

Target Rock Corporation moved in Supreme Court, Suffolk County, New York, pursuant to N.Y. CPLR §7503, to stay arbitration of a dispute on the ground that there was no agreement to arbitrate same. Local 431, IUE removed the case to the U.S. District Court for the Eastern District of New York on the ground that it raised issues under §301 of the Labor Management Relations Act, 29 USC §185, and counterclaimed to compel arbitration. Local 431 then moved for summary judgment to compel arbitration and Target Rock cross-moved for summary judgment to stay arbitration. Summary judgment was granted in favor of Local 431 and this appeal is from that judgment, rendered by Judge George C. Pratt. The opinion of Judge Pratt is not reported.

STATEMENT OF FACTS

Target Rock Corporation (Target Rock) is a subsidiary of Curtiss-Wright Corporation. Among the benefits provided to Target Rock's employees is a group health insurance plan, which is provided by Target Rock through its participation, along with sixteen other Curtiss-Wright Corporation subsidiaries, in an overall Curtiss-Wright Corporation group health insurance plan with Curtiss-Wright Corporation's insurance carrier. (A68, A72)*. Local 431, International Union of Electrical, Radio and Machine Workers, AFL-CIO (Local 431) is the certified collective bargaining representative of certain Target Rock employees. Local 431 does not represent the employees of any other Curtiss-Wright Corporation subsidiary.

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* All parenthetical references preceded by A___ are to pages in the Joint Appendix.

Target Rock was non-union prior to Local 431's certification by the National Labor Relations Board in July 1968 as the exclusive representative of certain Target Rock employees. During this time, Target Rock provided its employees with health, life, accidental death and dismemberment, and disability insurance in accordance with group insurance plans maintained by Target Rock through its own insurance carrier. (A66-67, A73-104). Following Local 431's certification, collective bargaining between the parties began, and Local 431 proposed, inter alia, improved health insurance coverage under a Local 431 plan which it maintained. Target Rock responded with a general outline of its own improved plan, Local 431 readily accepted Target Rock's admittedly superior plan, and there was very little further discussion about health insurance during the initial contract bargaining. Target Rock explained during the bargaining that the improved coverage outlined required dropping its then current plan and moving under the Curtiss-Wright insurance umbrella and participating in the overall Curtiss-Wright plan. (A67-68). At the conclusion of negotiations, the parties executed a collective bargaining agreement. The agreement made no mention of health insurance benefits. The insurance plan was set forth in a wholly separate and distinct group insurance agreement.

(A68, A105-08). The terms of both agreements were the same, January 28, 1969 through January 26, 1971. There was no reference whatsoever in the collective bargaining agreement to insurance benefits or to the separate and distinct insurance agreement. (A68). Only the collective bargaining agreement provided for resolution of disputes by arbitration.

During the bargaining for a new agreement which took place in late 1970 and early 1971, it was agreed, inter alia, that there would be improvements in the health insurance program--life and disability benefit provisions were improved and dental insurance was added to the coverage for the first time. There was no discussion whatsoever of the details of the additional coverage to be provided under the dental plan; the discussion was simply limited to whether or not there would be dental insurance coverage. (A69). Details of the dental insurance coverage were not provided until after the bargaining was completed and the revised insurance agreement was prepared and executed, effective January 27, 1971 through March 8, 1973. (A110-14). The parties also entered into a separate and distinct collective bargaining agreement, effective March 9, 1971 through March 8, 1973. Once again, there was no reference whatsoever to insurance benefits in the collective bargaining agreement.

During the 1973 bargaining between Target Rock and Local 431, there were no changes in health insurance coverage, and a brief, one page agreement was executed by the parties to indicate that the existing level of benefits would be maintained from March 8, 1973 through March 8, 1975. (A69, A116). In addition, there was again executed a wholly separate and distinct collective bargaining agreement between the parties covering the period from March 8, 1973 through March 8, 1975 and incorporating a number of negotiated changes. Again, there was no mention or reference whatsoever to insurance benefits in the collective bargaining agreement. (A69-70, A1-16).

The last round of bargaining between the parties took place in 1975. During the bargaining, there was some discussion, inter alia, concerning the addition of major medical coverage to the health insurance plan. Target Rock indicated the possibility of providing such coverage and it was discussed in general terms. When asked for details by Local 431, Target Rock responded that there was no written plan that could be given to Local 431 at that time, but that, as in the past, the additional insurance coverage would be comparable to that enjoyed by other Curtiss-Wright Corporation subsidiaries. The highlights of the Curtiss-Wright coverage were outlined and were accepted by Local 431. (A64-65, A70). As in the past, two separate and distinct documents were to be executed -- the collective bargaining agreement and the group health insurance agreement. (A17-33, A34-63).

The term of both agreements is May 6, 1975 through May 5, 1978. Once again, the collective bargaining agreement makes no reference whatsoever to insurance benefits or to the separate group health insurance agreement.

Target Rock and Local 431 executed the collective bargaining agreement, but Local 431 refused to execute the group health insurance agreement on the ground that it did not conform to the results of the bargaining. Specifically, Local 431 contends that the parties had agreed to an annual deductible of one hundred dollars to be applied against all major medical claims in any year. Target Rock asserts, and the unexecuted group insurance agreement clearly reflects, that the coverage agreed to provides for a one hundred dollar deductible which must be satisfied for each major medical claim. (A49).

Notwithstanding Local 431's failure to execute the group health insurance agreement, Target Rock implemented the major medical coverage as provided for in that agreement and Target Rock employees have been enjoying the benefits thereof.

On February 20, 1976, Local 431 filed the first grievance ever between the parties concerning insurance benefits. (A71,A117). An employee had had occasion to make his second major medical claim within one year and he was required under the group health insurance plan to pay his second one hundred dollar deductible. The union grieved this action as a violation of the collective bargaining agreement and submitted the dispute to the American

Arbitration Association for the appointment of an arbitrator when the matter was not resolved. Target Rock moved for a stay on the ground that the group health insurance agreement does not provide for arbitration of disputes.

Additional facts appear throughout the argument.

PRELIMINARY STATEMENT

The continuous treatment of the group health insurance benefit in a wholly separate and distinct agreement covering health insurance only and the absence of any reference whatsoever thereto in the collective bargaining agreement clearly evidence with "positive assurance" the parties' intention to exclude matters relating to health insurance from the grievance and arbitration provisions of the collective bargaining agreement. Moreover, arbitration is being sought as a substitute for negotiations. Local 431 is seeking to substantively rewrite the terms of the agreement, not to have the language interpreted. The national policy favoring arbitration to resolve disputes under collective bargaining agreements is an integral part of the broader national policy encouraging harmonious and stable labor relations through collective bargaining. First, therefore, there must be mutual agreement. Freedom of contract is the fundamental basis of our national labor policy. It cannot be subordinated to a process of dispute resolution never agreed upon by the parties.

ARGUMENT

THERE IS NO AGREEMENT TO ARBITRATE DISPUTES CONCERNING INSURANCE BENEFITS

It is elementary that arbitration of labor disputes is consensual in nature and cannot be invoked absent agreement of the parties to a particular dispute to submit to arbitration and be bound by the decision of the arbitrator. United Steelworkers v Warrior & Gulf Navigation Co., 363 US 574, 582, 46 LRRM 2416, 2419 (1960). Where arbitration has been provided for as the terminal and binding step in the grievance procedure of a collective bargaining agreement, there is a presumption of arbitrability if the arbitration clause is broad and the dispute is arguably based upon the contract. United Steelworkers v American Mfg. Co., 363 US 564, 46 LRRM 2414 (1960); United Steelworkers v Warrior & Gulf Navigation Co., supra. However, the courts have been specifically charged with the duty of deciding in the first instance whether an agreement to arbitrate has been made and, further, where a broad arbitration clause exists in a collective bargaining agreement

> whether the party seeking arbitration is making a claim which on its face is governed by the contract. [Emphasis added.]

American Mfg. Co., supra, 363 US at 568, 46 LRRM at 2415. The courts must determine

> whether the reluctant part has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

Warrior & Gulf Navigation Co., supra, 363 US at 582, 46 LRRM at 2419.

The facts in the case at bar compel a finding that the claim of Local 431 is not governed "on its face" by the parties' collective bargaining agreement and cannot, by any stretch of the imagination, be found to be subject to the arbitration agreement contained within the collective bargaining agreement.

There can be no mistake that insurance benefits have always been treated separate and apart from the collective bargaining agreement. Not one of the four collective bargaining agreements between the parties has ever made any mention or reference whatsoever to health insurance or the entirely separate agreement between the parties which covers health insurance. The group health insurance provided to Target Rock employees is also provided to sixteen other Curtiss-Wright Corporation subsidiaries and has, therefore, always been kept outside the scope of the collective bargaining agreement between Target Rock and Local 431.

The collective bargaining agreement clearly provides in Article XX-A that the grievance procedure is designed for settling

> any dispute, difference or grievance [that] arise[s] over the application or interpretation of any provision of this agreement ....[Emphasis added].

The arbitration provision in the collective bargaining agreement then provides in pertinent part as follows in Article XXI-A:

> [a]ll disputes, differences and grievances arising over the application or interpretation of this agreement which have not been satisfactorily settled after following the grievance procedure herein set forth, shall promptly be submitted to arbitration .... [Emphasis added.]

Mindful of the preference for arbitration established by the Supreme Court decisions in the Trilogy cases, American Mfg. Co., supra; Warrior & Gulf Navigation Co., supra; United Steelworkers v Enterprise Wheel & Car Corp., 363 US 593, 46 LRRM 2423 (1960), and the"imposing litany" which must be overcome to stay arbitration, IAMAW v General Electric Co., 406 F2d 1046, 1048, 70 LRRM 2477, 2478-79 (2d Cir.1969), the facts in this case clearly overcome that imposing litany and command a stay of the arbitration sought by Local 431. The District Court's blithe disregard of the conscious design of the parties to treat insurance separate and apart from the collective bargaining agreement was erroneous. There could be no more forceful evidence for this court to find "with positive assurance that the arbitration clause is not susceptible to an interpretaion that covers the asserted dispute." Warrior & Gulf Navigation Co., supra, 363 US at 582, 46 LRRM at 2419-20. Indeed, even the Supreme Court recognized as much in Warrior & Gulf when it noted that an exclusion from arbitration may be provided within the collective bargaining agreement itself by clear and unmistakeable language or evidenced by the existence of "a written collateral agreement" covering a particular subject matter that is not covered by or mentioned in the collective bargaining agreement. Id. at 584, 46 LRRM at 2420.

The requirement established by the Trilogy and acknowledged by this Court in IAMAW v General Electric Co., supra, that there be unambiguous language excluding disputes from arbitration is premised on the existence of a broad arbitration clause and a dispute or claim which is governed "on its face", American Mfg. Co., supra, by the collective bargaining agreement. Although the arbitration clause in the collective bargaining agreement between Target Rock and Local 431 is broad, it is nonetheless limited to the collective bagaining agreement which does not now, and never has, refer to , mention, or even hint at health insurance or the separate and distinct health insurance agreement. Under such circumstances, it is unrealistic to expect that clear and unambiguous language specifically excluding disputes concerning insurance would be found in the collective bargaining agreement. The separate "collateral" agreement renders the need for such language meaningless by removing any colorable basis for claiming that the subject matter of such collateral agreement is governed "on its face" by the collective bargaining agreement providing for arbitration of disputes.

Thus, a situation clearly distinguishable from that confronting this court in IAMAW v General Electric Co., supra, is presented in the case at bar. In General Electric, the grievance unquestionably concerned a specific provision of the parties' collective bargaining agreement. The arbitration provision, however, excluded certain matters from its coverage and General Electric contended that the particular dispute was not arbitrable pursuant to the exclusionary language. The determination of this issue, in turn, depended upon the interpretation of certain ambiguous exclusionary language. Since the grievance clearly related to a specific provision in the collective bargaining agreement and the language which the company was relying on to exclude the particular dispute was not clear, this court properly left the matter to the arbitrator for resolution.

In sharp contrast, the dispute in the case at bar is unquestionably not covered by anything in the collective bargaining agreement. If the parties had intended group health insurance to be part and parcel of the collective bargaining agreement in all respects, they could easily have done so. Obviously, they could have included the health insurance agreement within the contract. If this were too cumbersome because of the length of the insurance agreement, they could have incorporated the insurance agreement into the collective bargaining agreement by reference thereto in the body of the collective bargaining agreement. In fact, in one situation where such collateral agreements were incorporated by reference into the collective bargaining agreement, United Steelworkers v General Steel Industries, 499 F2d 215, 86 LRRM 2848(8th Cir. 1974), the court properly refused to stay arbitration concerning the collateral agreements and ordered the parties to arbitrate their dispute. Likewise, a similar situation and result is presented in the recent case of Westvaco Corp. v. Paperworkers, F.Supp. , 94 LRRM 2332 (SDNY 1977). However, in the case at bar, the parties neither by mention or by reference included the other agreement. They left group insurance wholly separate from the collective bargaining agreement.

The District Court ignored the clear intent of the parties manifested by the separate, unrelated agreements, by simply ignoring them. It relied instead on a settlement stipulation executed by the parties at the settlement of negotiations and preliminary to drawing and executing the new agreements. Since this agreement lumped the new terms of the collective bargaining agreement and changes in the insurance benefits in the same paragraph the District Court found this determinative of the inclusion of insurance benefits in the collective bargaining agreement. In so doing, it ignored another paragraph of the same stipulation calling for a new insurance agreement to be executed and the fact that the parties subsequently executed a formal collective bargaining agreement that continued to exclude any mention of health insurance benefits. (A125;¶C4).

The District Court completely misreads the legal significance of the documents, finding as determinative a provisional settlement stipulation and dismissing the formal contract spelling out the terms of the agreement as a subsequent "brochure"!

The District Court's reliance is erroneous. The formal contract evidences the agreement between the parties. It was executed shortly after ratification and signed by the parties. If the language did not reflect the parties intent, Local 431 would have objected, indeed, as it objected to the terms in the insurance agreement when it was presented. The stipulation ceased to have any significance thereafter. It became merged into the main agreement. This was no more than the continued understanding of the parties.

The repeated, conscious exclusion of the insurance benefit from the collective bargaining agreement is powerful evidence of the continued, persistent intention and design of the parties to keep the group health insurance agreement wholly separate and distinct from the collective bargaining agreement. The May 6, 1975 stipulation does not alter this result.

It should not be blithely assumed, as the District Court did, that the "indefinite reference" in the stipulation to major medical insurance coverage meant that the parties were leaving to an outsider the job of negotiating this benefit for them. The "indefinite reference" is what Local 431 bargained for and got, as it had in the past with respect to other insurance benefits. As in the past with health benefits, there was a general outline of the major medical coverage given during the course of the bargaining. The union accepted the fact that details would be provided subsequent to negotiations. They negotiated a new benefit -- major medical coverage -- but the details of the coverage were to be provided by Target Rock at a later date when it prepared the group insurance agreement in accordance with the overall Curtiss-Wright Corporation group health insurance agreement.

Local 431's argument today is not really a claim over the interpretation of any contract term. It is a claim that the company has refused to sign an agreement as negotiated, i.e., that the health insurance agreement presented for execution is not the one negotiated for. If the major medical coverage as presented to the union in the separate group health insurance agreement is not, in its opinion, the benefit negotiated and Target Rock disagrees, Local 431's recourse is to file charges at the National Labor Relations Board that the company is refusing to bargain in good faith by failing to reduce to writing an agreement reached during the course of negotiations. H.J. Heinz v. NLRB, 311 US 514, 7 LRRM 291 (1941). It is simply double-talk to assert on the one hand, that there is no agreement and then to ask to arbitrate under the agreement being denied. In practical effect, this is Local 431's position.

The Union is claiming that the insurance agreement does not reflect their agreement, yet they are seeking to have their claim resolved by an arbitrator pursuant to a mandate in another agreement to resolve disputes concerning "the application or interpretation of any provision of this agreement". There is no provision to be interpreted or applied. The major medical insurance program is in dispute not as to application or interpretation, but rather as to what it is.

The National Labor Relations Act, as amended, 29 USC §150 et seq., envisions harmonious and stable labor relations through collective bargaining and provides the administrative framework to foster that objective. The Act is based, however, on the fundamental policy of freedom of contract. NLRB v. H.K. Porter Co., 397 US 99, 73 LRRM 2561 (1970). The paramount national labor policy objective, therefore, is to encourage peaceful labor relations through collective bargaining without impinging on the right to freedom of contract. A subsidiary national labor policy is to preserve peaceful labor relations when disputes arise under collective bargaining agreements that have been negotiated by promoting arbitration of those disputes, Trilogy cases supra. Thus, the preference for arbitration is meant to serve the paramount policy of collective bargaining not to replace it. In the case at bar, compelling arbitration will effectively substitute the arbitrator for direct negotiations between the parties and mutual agreement on the subject matter at hand, as can be more easily seen from another perspective.

Let us assume that during the course of negotiations Target Rock agreed to increase the number of paid holidays, provided for in article VII of the collective bargaining agreement, by one day and prepared the collective bargaining agreement with that change. Assume further that Local 431, which believes the parties actually agreed to two additional paid holidays, refuses to sign the agreement because it does not reflect what it believes was agreed upon. Could it seriously be contended that Local 431 would have the right to arbitrate its claim that the collective bargaining agreement be rewritten before it is signed? Of course not. Neither party has the right to insist that the other submit to an arbitrator the decision on what the substantive terms of the agreement should be. Absent a negotiated collective bargaining agreement, there is no agreement to arbitrate. Independent Union v. Procter & Gamble, 312 F.2d 181, 51 LRRM 2752 (2d Cir. 1962), cert. denied, 374 US 83, 53 LRRM 2544 (1963)*.

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*A limited exception exists in certain situations where vested rights earned pursuant to a collective bargaining agreement that has expired are involved. Nolde Bros., Inc. v. Bakery & Confectionery Workers, Local 358, US , 94 LRRM 2753 (1977).

There is nothing to arbitrate. The Company's unexecuted group insurance agreement is clear and unambiguous. There is nothing for an arbitrator to interpret. Lodge 2036, IAM v. Hudson Mfg. Co., 331 F.Supp. 361, 78 LRRM 2341 (D. Minn. 1971). The case at bar cannot be said to present "one of a myriad of cases which the draftsman [of the collective bargaining agreement] cannot wholly anticipate". Warrior & Gulf, supra, 363 US at 578, 46 LRRM at 2418. There are no "[g]aps . . . left to be filled" or any need for "solving the unforeseeable". Id. at 580-81, 46 LRRM at 2419. Nor can Local 431's claim be said to be governed "on its face" by the collective bargaining agreement. The parties specifically dealt with the subject matter at issue, health insurance, and chose to exclude it from the collective bargaining agreement in all respects. The health insurance agreement is clear and unambiguous, wholly separate and distinct from the collective bargaining agreement, and ordering arbitration would simply be interfering with the parties' right to freedom of contract with respect to a matter they have not yet come to terms about.

CONCLUSION

On the basis of the foregoing, it is respectfully urged that the arbitration commenced by Local 431 be stayed permanently.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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Petitioner-Appellant,	:	AFFIDAVIT OF SERVICE
- v -	:	Docket #77-7133
LOCAL 431, INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,	:	
Respondent-Appellee.	:	

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STATE OF NEW YORK)
COUNTY OF) s.s.:

John Jacobi, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age, and resides at North Babylon, New York. That on the 12th day of April, 1977, at No. 1501 Broadway, New York, New York, deponent served the within Appellant's Brief and Appendix upon Vladeck, Elias, Vladeck & Lewis, the attorneys for Respondent-Appellee herein, by delivering a true copy thereof to them personally. Deponent knew the persons so served to be the persons mentioned and described in said papers as the attorneys therein.

John Jacobi
John Jacobi

Sworn to before me this
12th day of April, 1977.

Susan Vengroski

SUSAN VENGROSKI
NOTARY PUBLIC, State of New York
No. 30-4503977
Qualified in Nassau County
Commission Expires March 30, 1975

LAW OFFICES
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